MOFFAT COUNTY ROAD DEPARTMENT

IBLA 99-168 Decided January 24, 2003

Appeal from a decision of the Little Snake Field Office, Craig, Colorado, Bureau of Land Management (BLM), imposing time restrictions on a free use permit. COC 61232.

Affirmed.

1. Public Lands: Leases and Permits--Materials Act

Under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), and its implementing regulations, 43 CFR Part 3600, BLM has considerable discretion to dispose, by sale or other means, of mineral materials from the public lands. A BLM decision, made in the exercise of its discretionary authority, generally will not be overturned by the Board unless it is arbitrary and capricious, and thus not supported on any rational basis.

2. Endangered Species Act of 1973: Section 6--Public Lands: Leases and Permits--Materials Act

When a species is not listed as threatened or endangered under the Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994), but is listed as a "state threatened species" under Colorado law, recognizing Colorado law as authority for including a stipulation providing for time limitations on sand and gravel operations in a free use permit for the protection of that species is a proper exercise of BLM's discretion.

3. Public Lands: Leases and Permits--Materials Act

Where the record of decision for the governing resource management plan supports the restriction of resource development activities on critical raptor nest buffer zones from Feb. 1 through July 30, a stipulation in a free use permit

> limiting, inter alia, removal of rock between Apr. 1 and July 30, for purposes of protecting western burrowing owl nesting habitat, will be affirmed.

APPEARANCES: Dennis R. Jones, Road Supervisor, Moffat County Road Department, Craig, Colorado, for appellant; Lowell L. Madsen, Esq., Assistant Regional Solicitor, Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Moffat County (Colorado) Road Department (Moffat County), has appealed from a December 10, 1998, letter decision of the Bureau of Land Management (BLM) Area Manager, Little Snake Resource Area, Craig, Colorado. The decision modified a stipulation (Stipulation #20) in a free use permit issued to Moffat County on November 12, 1998, authorizing sand and gravel removal from Federal lands. Stipulation #20 placed both operational and time restrictions on Moffat County's mining authorization in order to protect a known western burrowing owl (burrowing owl) nesting site. The burrowing owl is a raptor, and is listed by the Colorado Division of Wildlife (CDOW) as a threatened species. 1/ BLM implemented the stipulation on the basis of multiple use principles which require BLM to maintain habitat for sensitive species. (Decision at 2.)

The original permit authorized Moffat County use of public land in specified areas of sections 4 and 9, T. 9. N., R. 96 W., Sixth Principal Meridian, but Stipulation #20 prohibited all crushing and gravel production between April 1 and July 30 in order to protect burrowing owl nesting habitat located in section 4. At Moffat County's request, BLM reconsidered the stipulation. BLM's December 10 decision modified the stipulation based on verbal and written representations made on November 24, 1998, by Marvin Moore, appellant's consultant.

According to Moore, the pit would be developed in a northeasterly direction beginning in the NW1/4 NE1/4 sec. 9, moving into the NE1/4 of the NE1/4 NE1/4 sec. 9, towards the SE1/4 SE1/4 sec. 4. Northern portions of the SE1/4 SE1/4 sec. 4 are withdrawn from gravel mining by BLM to protect prairie dog habitat, which also contains the burrowing owl habitat. Moore's letter states:

> [M]ining will commence in the Southwest portion of the affected area and will proceed to the northeast. I estimate that during the first 10 year lease period Moffat County's crushing operation will be an average

1/ See Attachment to Answer, Draft Resource Management Plan (RMP) and Environmental Impact Statement (EIS), 3-43.

> of 1000 feet from the prairie dog habitat shown in the upper portion of the map.
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> I would expect that, typically, the crusher would move onto the site in January, or February, and it would produce road-base materials for about 3 months. The stockpile would last for about 3 to 4 years and, then, the crusher would return. In addition, Moffat County would mine "pit-run" sand and gravel at this site for road development and maintenance.

(Letter from Marvin Moore to BLM received November 24, 1998.)

BLM's December 10 decision retains production and crushing limitations from April 1 through July 30 in section 4, but permits production and crushing in section 9 in accordance with the mining proposal set forth in Moore's letter. 2/ Stipulation #20 now provides:

> No crushing or gravel production is allowed in section 4, T.9N., R.96W. between April 1 and July 30 to protect the nesting burrowing owl. This does not include the hauling of gravel. The timing stipulation for crushing or gravel production is waived in section 9, T.9N., R.96W. if the Draft Mining Plan (presented 11/24/98 by Marvin Moore) is implemented. Items of importance include: 1) Mining operations begin in the SW corner and move toward the NE; 2) Operations during the first 10 years of the permit will be an average of 1000 feet from the prairie dog habitat, but no closer than 500 feet; 3) Crushing operations occur during winter and early spring for one season, then re-occur at 3-4 year intervals. 4) The stipulation will be re-evaluated when the ten-year permit expires, or if the Mining Plan is modified.

[1] BLM's authority to grant free use permits for purposes of selection, removal, and use of mineral materials is grounded in the Materials Act of July 31, 1947, 30 U.S.C. § 601 (1994) (Materials Act), and regulations found at 43 CFR Part 3600. The Materials Act authorizes the Secretary, "under such rules and regulations as he may prescribe," to dispose of mineral materials on public lands. 30 U.S.C. § 601 (1994). The Act provides, in pertinent part:

> [T]o the extent not otherwise authorized by law, the Secretary is authorized in his discretion to permit any

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2/ The decision states that "the amended stipulation allows gravel crushing and sorting during the restricted period if the crusher is located south of section 9." (Decision at 1 (emphasis supplied).) However, the stipulation clearly expresses an intent to permit crushing or gravel production within section 9.

> Federal, State, or Territorial agency, unit or subdivision, including municipalities, or any association or corporation not organized for profit, to take and remove, without charge, materials and resources subject to this subchapter, for use other than for commercial or industrial purposes or resale. [Emphasis in original.]

Under the Materials Act and its implementing regulations, BLM has considerable discretion to dispose, by sale or other means, of mineral materials from the public lands. Echo Bay Resort, 151 IBLA 277 (1999); Jenott Mining Corp., 134 IBLA 191, 194 (1995); Glen B. Sheldon, 128 IBLA 188 (1994). However, this discretion is bridled by BLM's mandate to manage the public lands under principles of multiple use and in accordance with land use plans developed pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), and to prevent the unnecessary and undue degradation of Federal lands. See 43 U.S.C. §§ 1701(a)(7) and 1732(a) and (b) (1994); 43 CFR 3600.0-3(b).

Under multiple use principles, the Secretary is bound to manage the public lands consistent with laws relating to endangered or threatened species. 43 U.S.C. § 1732(b) (1994). Unnecessary and undue degradation may result when the lands are not managed in accordance with applicable environmental protection statutes and regulations. 43 CFR 3600.0-5(k). No disposal is authorized by the statute where it would be "detrimental to the public interest." 30 U.S.C. § 601 (1994).

A BLM decision made in the exercise of its discretionary authority generally will not be overturned by the Board unless it is arbitrary and capricious, and thus not supportable on any rational basis. Echo Bay Resort, supra at 281; Utah Trail Machine Association, 147 IBLA 142, 144 (1999); Glenn B. Sheldon, supra at 191. The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual or legal analysis, or that the decision is not supported by a record showing that BLM considered all relevant factors (including less stringent alternatives to the decision) and acted on the basis of a rational connection between the facts found and the choice made. Utah Trail Machine Association, supra at 144 (authorized use of new trail); John Dittli, 139 IBLA 68, 77 (1997) (right-of-way); Glenn B. Sheldon, supra at 191 (mineral material sale); Larry Griffin, 126 IBLA 304, 306-07 (1993) (closure of existing road to motorized use). A difference of opinion is insufficient to establish error on BLM's part. Blue Mountains Biodiversity Project, 139 IBLA 258, 267 (1997).

In its Statement of Reasons (SOR) and later briefing 3/, Moffat County objects to the time limitations imposed on mining in section 4, as well as BLM's formal adoption of the "setback limitations" described in

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3/ Both parties submitted responses to the original SOR and Answer filed in the appeal. Appellant's response to BLM's Answer is designated in this decision as "Reply Brief." BLM's response to Moffat County's Reply Brief is designated as the "Response to Reply."

Moore's letter. 4/ Appellant claims that it reached an agreement with BLM that exclusion from the permit of the approximately 17 acres of land in the SE1/4 SE1/4 sec. 4 "would entirely mitigate any potential harm to the burrowing owl." (Reply Brief at 1.) Appellant maintains that the burrowing owl is not listed under the Endangered Species Act, nor is it listed on any BLM register of threatened species; therefore, the permit restrictions are overly broad. Appellant asserts that, while BLM claims that it is protecting the habitat pursuant to a Colorado listing, Colorado law provides only that "threatened" species may not be "taken" or destroyed without a permit, and does not provide for restriction on leases and permits to protect such species. (SOR at 2; Reply Brief at 1.) Lastly, appellant claims that the June 1989 Little Snake Resource Management Plan and Record of Decision (RMP) does not provide a basis for BLM's restrictions on the permit, nor does scientific evidence support the decision.

In its Answer, BLM maintains that failure to protect the burrowing owl habitat will result in a prohibited taking of a protected species. (Answer, Attachment 1, at 2.) BLM relies upon the restrictions imposed by the ESA in reaching this conclusion. According to BLM, although the burrowing owl is not listed as a threatened or endangered species under the ESA and is not listed as a sensitive species under any BLM listing 5/, it is listed under Colorado's equivalent of the Federal Act, and must therefore be accorded habitat protection by virtue of BLM's internal policy, set forth in the BLM Manual. BLM further contends that the RMP provides ample authority for the restrictions imposed by Stipulation #20.

[2] Until February 28, 1996, the burrowing owl was listed as a "category 2" species under the ESA, but the quality of information indicating that the species was threatened or endangered varied. (Answer, Attachment 1, at 1.) BLM reports that the burrowing owl is listed as a "state threatened species" by the State of Colorado. (Attachment to BLM Response to Reply entitled "Colorado Listing of Endangered and Threatened Wildlife Species and Species of Special Concern," produced by CDOW.)

In limiting appellant's permit for the purpose of extending habitat protection to the burrowing owl, BLM relies upon section 6840 of the BLM Manual, which provides policy and guidance for the conservation of threatened and endangered species and their habitats on BLM-administered lands in Colorado. Section 6480.06.E of the BLM Manual provides:

4/ Although appellant does not define "setback limitations," we presume the phrase refers generally to BLM's formalization in the stipulation of work practices espoused in the Moore letter, particularly (but not limited to), the distance restrictions Moore represented would be respected in relation to the prairie dog habitat, as well as the time constraints that Moore indicated would circumscribe crushing operations in section 9.

5/ The decision states that the burrowing owl is a "BLM sensitive species." (Decision at 2.) In its Answer, however, BLM does not maintain that the burrowing owl is listed as sensitive by BLM, but instead relies upon the fact that the burrowing owl is state-listed.

> State laws protecting [state-listed] species apply to all BLM programs and actions to the extent that they are consistent with FLPMA and other Federal laws. In States where the State government has designated species in categories that imply local rarity, endangerment, extirpation, or extinction, the State Director will develop policies that will assist the State in achieving their management objectives for those species.

Id. The BLM Manual provides in essential terms that BLM "will develop policies that will assist [Colorado] in achieving [its] management objectives for [the burrowing owl]." The record in this case shows that BLM has properly exercised its discretion in assisting Colorado in protecting "special status" species, including state-listed species such as the burrowing owl.

BLM's policy for conservation of threatened or endangered species in Colorado, as is implemented in Stipulation #20 of the free use permit issued to Moffat County, is reflected in a Master Memorandum of Understanding (MOU) between the Colorado Department of Natural Resources, Division of Wildlife, and BLM. See BLM Answer, Attachment 1; BLM Response to Moffat County's Reply. In this MOU, BLM commits that it

> will give full policy and management consideration to the conservation, protection, and enhancement of all state-listed threatened and endangered species and their BLM-administered habitat and shall comply with all applicable State laws and regulations as they are consistent with Federal laws and regulations.

(Answer, Attachment 1, at 2; emphasis added).

As noted, there is a debate between Moffat County and BLM as to whether BLM had the authority to include Stipulation #20 in the permit issued to Moffat County pursuant to Colorado law, given that the burrowing owl has not been listed as threatened or endangered under the ESA. Moffat County has cited no provision of the ESA which would deny BLM the authority to "cooperate" with Colorado in protecting a species, such as the burrowing owl, in the manner reflected in the record relating to the initial and revised Stipulation #20.

Guidance in addressing whether BLM has the authority to impose restrictions such as reflected in Stipulation #20 can be found in the recently decided Ninth Circuit decision in National Audubon Society, Inc. v. Davis, 307 F.3d 835 (9th Cir. 2002), wherein the Ninth Circuit addressed a situation in which there was a perceived conflict between California law and the ESA with regard to the use of leghold traps. In discussing the Supremacy Clause, Art. VI, cl. 1, the Ninth Circuit stated:

> Federal law can preempt state law in three ways. First, Congress may expressly preempt state law. Second, preemption may be inferred where Congress has occupied a given field with

> comprehensive regulation. Third, a state law is preempted to the extent that it actually conflicts with federal law. "Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.'" Id. (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 20 L.Ed.2d 248 (1963).

307 F.3d at 852.

To the degree that Moffat County argues that BLM had no authority to impose Stipulation #20 because the burrowing owl is not listed as threatened or endangered under the ESA, and thus there is no preemption issue, it is appropriate to briefly discuss what is required of BLM under the ESA. The principal purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species." 16 U.S.C. § 1532(b) (1994). The BLM Manual recognizes the ESA mandate that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1532(c)(1) (1994). Germane to BLM's cooperation with Colorado in protecting the burrowing owl in adopting Stipulation #20 is the following ESA provision:

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. § 1532(3) (1994).

In returning to National Audubon Society, Inc. v. Davis, supra, the Ninth Circuit addressed whether the ban on the use of leghold traps violated the preemption clause of the Constitution. The Court reviewed section 6(f) of the ESA, 16 U.S.C. § 1535(f) (1994), which, consistent with BLM's handling of the Moffat County case, provides:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species, is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this

> chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

(Emphasis added.)

As summarized by the Ninth Circuit, the National Audubon Society, et al., "contend that the italicized sentence carves out an exception to the ESA that allows California, through Proposition 4, to 'conserve' the animals that would be trapped by the leghold traps prohibited by the proposition." 307 F.3d at 853. The Court's reading of the italicized sentence was that states are allowed "to pass laws and promulgate regulations that would conserve wildlife, but to do so only insofar as those laws and regulations are consistent with the protection of endangered species under the ESA." Id.

In placing this case into the context of the ESA, we must emphasize again that Colorado has not adopted the standards set forth in the ESA for state-listed species. This reality cannot be separated from the fact that the burrowing owl is not listed as threatened or endangered under the ESA. The only question presented is whether BLM had the discretion and the authority to recognize Colorado law in imposing Stipulation #20 in the permit issued to Moffat County pursuant to the Materials Act of 1947, as amended, supra.

BLM's cooperation with Colorado in protecting the burrowing owl is consistent with Loggerhead Turtle v. County Council of Volusia County, Florida, 92 F.Supp.2d 1296, 1302 (2000), in which the court stated:

> The ESA requires the Secretary to cooperate with the States to the maximum extent practicable in carrying out the programs authorized under the Act. See 16 U.S.C. § 1535(a). In this respect, the Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered or threatened species. Id. at § 1535(b). Additionally, the Secretary may enter into cooperative agreements with any State which establishes and maintains an adequate and active program for the conservation of endangered or threatened species. Id. at 1535(c). The Act details the criteria for determining whether a State program may be deemed "adequate and active." Id. The Secretary is authorized to provide financial assistance to any State which has entered into such a cooperative agreement. Id. at § 1535(d).

92 F.Supp.2d at 1303. The Court stated succinctly that "[t]o the extent that a state's regulation of 'taking' is less protective than the ESA, it is preempted." Id. However, it follows from the court's analysis that when a state's regulation is more stringent or restrictive, Federal agencies are required to cooperate with the state in protecting threatened or endangered species.

In the Moffat County situation, Colorado's protection of the burrowing owl, pursuant to the previously cited MOU, is more restrictive, and thus consistent with the ESA, since the species is not listed as threatened or endangered under the ESA. There is simply no conflict in this case between the ESA and Colorado law. Under the ESA, a taking, incidental or otherwise, includes any action which "harass[es] [or] harm[s]" a threatened species. 16 U.S.C. § 1532(19) (1994). An incidental taking is that which "result[s] from, but [is] not the purpose of, carrying out an otherwise lawful activity." 50 CFR 402.02. Moreover, the relevant provisions of the Colorado Revised Statutes (CRS) are consistent, under any reading or interpretation, with the ESA in providing for the state listing of threatened and endangered species. See CRS 33-2-105. That statute provides, inter alia, that

> it is unlawful for any person to take, possess, transport, export, process, sell or offer for sale, or ship and for any common or contract carrier to knowingly transport or receive for shipment any species or subspecies of wildlife appearing on the list of wildlife indigenous to this state determined to be threatened within the state pursuant to subsection (1).

CRS 33-2-105(4). Under the Colorado statute, "take" means "to acquire possession of wildlife; but such term shall not include the accidental wounding or killing of wildlife by a motor vehicle, vessel, or train." CRS 33-1-102(43). There is no "incidental take" provision in the Colorado statute, nor does the Colorado statute provide for habitat protection of state-listed species. Even so, in our view, BLM's imposition of Stipulation #20 is consistent with BLM's stated policy as reflected in the BLM Manual, and is consistent as well with the cited provisions of the ESA, as interpreted by the Federal Courts cited supra.

We reject Moffat County's argument that in applying Colorado law in imposing Stipulation #20, BLM violated the ESA. BLM did not interpret the ESA as preempting Colorado law, since the ESA preempts state statutes only in situations where the two are in conflict, or when the state statutes are less restrictive. See Man Hing Ivory and Imports, Inc. v. Deukmejian, 702 F.2d 760, 762-63 (9th Cir. 1983). There is simply no conflict with Colorado law in this case.

As stated, section 6(f) of the ESA, supra, provides that state laws involving Federally-listed species may not provide less protection to those species than the ESA. See Gibbs v. Babbitt, 214 F.3d 483, 484 (4th Cir. 2000) cert. denied Gibbs v. Norton, 148 L.Ed.2d 957, 69 U.S.L.W. 3552 (2001); Swan View Coalition, Inc. v. Turner, 824 F.Supp.

923, 938 (D. Mont. 1992). Where a species is not listed under the ESA, but is state-listed only, section 6(f) does not provide the Federal government with authority to impose more stringent measures of protection mandated by the ESA. As the Court said in Loggerhead Turtle v. Council, Volusia County, Fla., supra, "[t]he Act requires no affirmative conservation action by states or local governments. The Act neither compels nor precludes local regulation; it preempts that which is in conflict." See also Man Hing Ivory and Imports, Inc. v. Deukmejian, supra at 762-63.

In this case BLM acted appropriately in invoking the burrowing owl's status as threatened under Colorado law as a basis for including Stipulation #20 in the free use permit issued to Moffat County. Further, the ESA contemplates that states will develop their own conservation programs for the protection of threatened and endangered species, with support from the Federal government. See 16 U.S.C. § 1531(a)(5) (1994). Section 6 of the ESA authorizes the Department to cooperate with the states in protecting wildlife habitat. Under the provisions of section 6, the Department may enter into management and cooperative agreements with the states; it may allocate funds to the states for wildlife management; and it may review state programs involving the protection of threatened species. 16 U.S.C. § 1535 (1994). In its Answer, BLM stated that "[t]he authority for the conservation of species is a Master Memorandum of Understanding [MOU] between [CDOW] and the Bureau of Land Management, Colorado (6521, Rel. No. CSO 1-55, Appendix 1 and Bureau Manual 6840.04E." (Answer, Attachment 1 at 1.) However, neither party produced any document which could be construed as a cooperative agreement between BLM and Colorado involving conservation and management of the burrowing owl.

Moffat County avers that the burrowing owl appears on a list of "declining species" under an MOU between CDOW and the Department concerning programs to manage declining species, which went into effect on October 15, 1998, and that this fact renders the inclusion of Stipulation #20 in its permit as invalid. (Reply Brief at 4-5.) According to Moffat County, that MOU provides that both agencies will

> [e]nsure to the best of either agencies' abilities that sensitive and/or declining species occurring on the Bureau's public lands will be managed within the scope of the Declining Species agreement between the State of Colorado and the Department of the Interior for those species vulnerable to either Federal or State listing status.

Id. Further, Moffat County states that that MOU requires the agencies to execute a conservation agreement setting forth what the parameters of protection will be for the various species. Again, neither Moffat County nor BLM has provided the Board with any such conservation agreement. However, given our previous discussion, we do not view this absence as a reason to invalidate Stipulation #20. Rather, we reiterate that the inclusion of Stipulation #20 in the free use permit issued to Moffat County was a proper and reasonable exercise of BLM's discretion.

To summarize, the burrowing owl has not been placed on the threatened or endangered species list pursuant to the ESA. However, as noted, it has been listed as a "state threatened species" by the State of Colorado. BLM invoked the status of the burrowing owl under Colorado law as justification for including Stipulation #20 in Moffat County's free use permit, which placed operational and time limitations on Moffat County's mining authorization in order to protect the burrowing owl. The authority cited supra is clear that BLM acted within its discretion in recognizing Colorado law as a basis for including Stipulation #20 in Moffat County's permit. Since the burrowing owl has not been classified as threatened or endangered under the ESA, there is no apparent conflict with Colorado law. BLM's discretion on this issue was properly exercised.

[3] The ESA, however, is not the sole legal avenue by which wildlife is afforded habitat protection. As we stated earlier, BLM is mandated to manage the public lands under principles of multiple use and in accordance with land use plans developed pursuant to FLPMA. See 43 U.S.C. §§ 1701(a)(7) and 1732(a) and (b) (1994); 43 CFR 3600.0-3(b). Land use and resource management plans are developed pursuant to section 202 of FLPMA. See 43 U.S.C. § 1712 (1994). Resource management plans are designed to guide and control future government actions. 43 CFR 1601.2. They establish, in a written document, the particular mix of multiple uses for a particular area of the public land. They include various allowable uses and restricted uses based upon a detailed review by BLM and input from the public. See generally 43 CFR 1601.0-5 and Subpart 1610.

The objective of resource management planning is "to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, * * * [and others]." 43 CFR 1601.0-2. There is no requirement that wildlife protection afforded in the context of a resource management plan be limited to protections afforded by the ESA. See generally 43 CFR Subpart 1610. There is, however, the requirement that the resource management plan be applied consistently.

Review of land use plans is outside the scope of this Board's jurisdiction, although the Board has jurisdiction to adjudicate an appeal of a BLM decision implementing a resource management plan. Communications Management Co., 141 IBLA 115, 119 (1997); Joe Trow, 119 IBLA 388, 393 (1991); 43 CFR 1610.5-3(b). The decision now before us is such a decision.

Appellant contends that there is no basis in the Little Snake RMP for restricting its operation in the manner imposed by Stipulation #20, and that the RMP provides no basis for imposing "habitat-disturbing" restrictions on activities not associated with oil and gas development. (Reply Brief at 1; SOR at 3.) Appellant charges that BLM is requiring it to comply with restrictions which were imposed by a later amendment to the RMP, and which were limited to oil and gas leases and conditions of approval. Finally, appellant maintains that the restrictions imposed on

its operations in order to protect the burrowing owl are without scientific basis, and are therefore arbitrary. (SOR at 4.)

BLM acknowledges that the RMP was amended to address oil and gas leasing, but claims that Stipulation #20 was not based on the oil and gas amendment. (Answer, Attachment 1, at 2.) BLM asserts that the RMP analyzed impacts to species and habitats from many resource development activities, and permits resource development restrictions on projects not specific to oil and gas development. Id. Finally, BLM contends that evidence and data from many studies were summarized and evaluated during the RMP planning process, and that this provides sufficient justification for the stipulation. Id. at 3. BLM maintains that to exempt appellant from requirements imposed by the RMP would be to make an exception for the appellant which is not applied across the board. (Response to Reply, Attachment at 2.)

Provisions relating to wildlife habitat are found in the Little Snake RMP at 12-14. Pertinent provisions provide:

> Planned Actions
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> 4. Wildlife habitat will be maintained or improved through mitigation or restrictions applied to all wildlife habitat-disturbing activities.
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> 5. Wildlife habitat will be maintained or improved by using seasonal restrictions on activities to maintain wildlife production areas and important wildlife habitat (see Table 4).

(RMP at 12.) Table 4 provides that resource development activity will be permitted in critical raptor nest buffer zones between August 1 and January 31. Id. The RMP also provides that new oil and gas leases will contain no-surface-occupancy stipulations for a number of wildlife species, including raptors. (RMP at 13.)

The RMP does not limit seasonal restrictions specifically to oil and gas development. Table 4 is entitled, "Dates Allowed for Resource Development in Areas of Wildlife Concerns." (RMP at 12.) The burrowing owl is listed in the RMP as a raptor of "high interest" to BLM. While the burrowing owl has not been elevated to the status of a protected species under the ESA, the RMP makes clear that BLM has discretion to consider the impacts of any resource development project on raptors, an order of birds which includes the burrowing owl.

We find that BLM's use of its discretion in this instance is supported by the RMP and the Draft EIS/RMP. The Draft RMP lists the burrowing owl as a high interest species. Appellant represents that BLM and CDOW have an MOU that the owl is a declining species. The RMP provides clear authority for BLM to limit resource development in order to protect

raptor habitat. Moreover, BLM has authority, under the regulations, to require that free use permittees submit a mining plan of operations. 6/ 43 CFR Subpart 3602.

Appellant claims that BLM has no scientific basis on which to support its conclusion that restrictions on resource development are necessary to protect the owl. However, given that the RMP provides clear authority for BLM's decision, we find that this argument is not properly before us, but should have been raised with BLM at the time the RMP was developed. The Board is without jurisdiction to review appeals from planning decisions, even if they are timely made, which this one was not. Communications Management Co., supra; Joe Trow, supra.

As we stated earlier, in order to prevail in an appeal of BLM's use of its discretionary authority, appellant must demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual or legal analysis, or that the decision is not supported by a record showing that BLM considered all relevant factors (including less stringent alternatives to the decision) and acted on the basis of a rational connection between the facts found and the choice made. The Board is required to determine whether BLM's decision can be supported on any rational basis. In this instance, we find that BLM's decision is supportable and that appellant has not met its burden.

Accordingly, pursuant to the authority granted to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James F. Roberts
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

6/ Underlying this dispute is the sense that Moffat County's consultant, Marvin Moore, negotiated a more stringent plan of operations than county officials were comfortable with. In addition, there is no evidence in the case file to establish that official notice was ever given to the county that a plan of operations was required. Under these circumstances, appellant may wish to petition BLM for modification of the plan, to determine whether there are any areas in which the stipulation can be renegotiated to the satisfaction of both parties, while continuing to support burrowing owl habitat.